IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CONRAD TYLER JONES

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

Court of Appeals No. A-13629

Trial Court No. 4GA-19-00023CR[1]

# RESPONSE TO PETITION FOR REVIEW

VRA CERTIFICATION. I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

**Department of Law, Criminal Division**
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

## INTRODUCTION AND BACKGROUND

Conrad Jones[2] is charged with three counts of murder and one count of weapons misconduct arising from the shooting death of Gene Mayfield in his Koyukuk home in 2019. Jones' trial is currently scheduled to begin in July 2020, in Nenana, which is the presumptive trial site for felony offenses committed in Koyukuk. However, the trial court has stayed proceedings pending resolution of Jones' petition for review.[3]

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[1] The hearings in this case also were held concurrently for *State v. Huntington*, 4GA-19-00012CR; Huntington has not joined Jones' Petition.

[2] Jones is Koyukon-Athabascan by ethnicity.

[3] The trial court first re-set the trial date, and then stayed proceedings after Jones file his petition.

Jones filed a motion (1) claiming that a jury selected from the Nenana Venue District would not meet the requirements of *Alvarado v. State*,[4] and (2) seeking jury selection from a venire panel composed of residents of the Galena Venue District. [Pet. App. 2] Jones based his claims primarily on a distinction between the communication styles of Native Alaskan rural residents living off the road system, and the communication styles of rural residents connected to the Parks Highway road system. [*Id.*] Jones argued the venire should be selected from the Galena venire pool because, according to Jones, the Galena jury pool will encompass residents using the same communication style used by Koyukuk residents. [*Id.*] After holding both an evidentiary hearing and an administrative hearing, the trial court denied Jones' motion, setting out its factual findings and legal conclusions in a detailed, 21-page order. [App. A (audio recording of the hearings); Pet. App. 1]

Jones now seeks this Court's discretionary review of the superior court's order denying Jones' request for a venire panel from the Galena Venue District. This Court should affirm the trial court's factual findings and conclusion that a jury drawn from the presumptive trial site will not violate Jones' right to a jury drawn from a fair-cross section of the community in which the crime occurred. This Court should also affirm the trial court's conclusion

[4] *Alvarado v. State*, 486 P.2d 891, 902 (Alaska 1971).



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1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
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that the logistical difficulties presented by selecting a jury from Galena render Jones' proposal "impractical and unreasonable in the absence of a constitutional violation." [Pet. App. 1, at 21]

## I. SELECTING A JURY FROM THE PRESUMPTIVE VENUE DISTRICT WILL NOT VIOLATE JONES' RIGHTS UNDER *ALVARADO*

Jones has failed to show a systematic exclusion of a distinctive group, has not established that off-road native village residents along the Yukon River (communities such as Koyukuk and Galena) comprise a group distinctive from village residents of the Nenana Venue District (who are connected to the road system), and has not demonstrated that the Nenana Venue District jury pool fails to reflect a cross-section of the Alaskan Native village population in the Yukon River area and the Tanana Valley. In short, Jones failed to establish a systematic exclusion of Alaska Native village residents, or residents sharing the same communication patterns as Koyukuk, from his jury pool. *See Wyatt v. State*, 778 P.2d 1169, 1171 (Alaska App. 1989).

### A. The relative percent of Alaska Natives living in the communities at issue does not establish an *Alvarado* violation

As the trial court recognized, juries must be drawn from sources that reasonably reflect a fair cross-section of the population of the community where the crime occurred. *Alvarado*, 486 P.2d at 902. To ensure Alaska juries comply with this cross-section requirement, the Alaska Supreme Court identified trial



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1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

sites that presumptively comply with *Alvarado* when a crime is alleged to have occurred within a particular venue district. Alaska R. Crim. P. 18(a); *Smith v. State,* 440 P.3d 355, 360 (Alaska App. 2019); *John v. State*, 35 P.3d 53, 55 (Alaska App 2001) ("Alaska Criminal Rule 18 was designed to implement the *Alvarado* decision."). For crimes arising in Koyukuk, Galena is the presumptive trial site for district court trials and Nenana is the presumptive trial site for superior court trials.

Statewide lists of prospective jurors are randomly selected each year from the list of Alaska Permanent Fund Dividend applicants. *See* AS 09.20.050(b). Local master jury lists, like the list for the Nenana Venue District, are generally based on the statewide master list and include the residents of communities within a 50-mile radius of the presumptive trial sites. Alaska R. Admin. 15(c). However, the presiding judge may alter that radius on an annual basis, and individual trial judges retain discretion to expand the area from which a venire list is drawn, if it is shown that the pool of prospective jurors prescribed by Criminal Rule 18 and Administrative Rule 15 does not satisfy *Alvarado*. *See Smith,* 440 P.3d at 360.

Jones argues that, for a crime that occurred in Koyukuk, a jury pool consisting of the residents of the Nenana Venue District does not satisfy *Alvarado.* [*See generally*, Pet. at 1-15: Pet. App. 2] As the movant, Jones bears the burden of demonstrating that the pool of prospective jurors for his felony

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1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
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trial does not meet *Alvarado's* standards. To do so, Jones must establish "(1) that the residents of the community where his crime occurred [(Koyukuk)] are members of a culture that is materially distinct from the culture of the residents of [the Nenana Venue District] under the test announced in *Alvarado*, and (2) that a jury pool drawn from the residents of [the Nenana Venue District] will fail to fairly and reasonably represent the culture of the residents of [Koyukuk] (in proportion to the number of [Koyukuk] residents within the venue district)." *Smith v. State*, 440 P.3d 355, 363 (Alaska App. 2019) (citing *Tugatuk v. State*, 626 P.2d 95, 100 (Alaska 1981) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)); *Hampton v. State*, 569 P.2d 138, 148 (Alaska 1977) (quoting *United States v. Guzman*, 337 F.Supp. 140, 143 (S.D.N.Y 1972), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973)).

Jones argues the percentage of Alaska Natives living in the communities generally included in jury pools for the Nenana Venue District is lower than the percentage of Alaska Natives living in the communities included in Galena jury lists, and the trial court failed to consider those statistics. But as noted above, the issue here is whether a jury pool drawn from the residents of the Nenana Venue District will fail to fairly and reasonably *represent* the culture of the residents of Koyukuk "in proportion to the number of [Koyukuk] residents within the venue district." *Smith*, 440 P.3d at 363



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(emphasis added). Jones is not entitled to a trial jury that is statistically proportionate to the Koyukuk or Galena venue populations in terms of percentage of Alaska Natives. *Malvo v. J.C. Penney Co., Inc.*, 512 P.2d 575, 582 (Alaska 1973) (quoting *Nolan v. United States*, 423 F.2d 1031, 1035 (10th Cir. 1969)) ("[T]he constitutional fair and impartial jury guaranty does not require that every economic, racial, or ethnic class shall be represented on every jury venire or panel."). *See also Batson v. Kentucky*, 476 U.S. 79, 84-85 nn.4, 6, 106 S.Ct. 1712, 1716-17 nn.4, 6 (1986) ("[W]e have never held that the Sixth Amendment requires that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."); *Taylor v. Louisiana*, 419 U.S. 538, 538, 95 S.Ct. 692, 702 (1975) (holding that venires from which juries are drawn "must not systematically exclude distinctive groups in the community," yet, "[d]efendants are not entitled to a jury of any particular composition"). Thus, "perfect proportional representation" in jury pools is not constitutionally required. *Guzman*, 337 F.Supp. at 143. Finally, '[t]he mere fact that a jury selection system is imperfect does not make it invalid." *Id.* (citing *Swain v. Alabama*, 380 U.S. 202, 209 (1965)).

As such, the trial court correctly noted, "neither *Alvarado*, nor any other Alaska cases have applied a racial quota test to determine whether a defendant's fair cross-section rights have been violated." [Pet., App. 1 at 19]



**Department of Law, Criminal Division**
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
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Instead, as this Court noted in *Smith*, a jury pool will satisfy *Alvarado* "so long as the jury selection pool includes a reasonable number of people who share the culture of" the area where the crime occurred. *Smith*, 440 P.3d at 363 (citing *Wyatt v. State*, 778 P.2d 1169, 1170-71 n.2 (Alaska App. 1989)).

The key issue under *Alvarado* is, therefore, whether a Nenana venire pool can fairly and reasonably represent the culture of Koyukuk residents. *See e.g., Smith*, 440 P.3d at 363 (defendant failed to show off-road village residents' attitudes, beliefs, and experiences differed from those of Kotzebue residents); *Wyatt*, 778 P.2d at 1171 (defendant failed to prove that Metlakatla residents shared "a basic similarity in attitudes or ideas or experience which . . . cannot be adequately represented" by residents of other Native Alaskan villages, despite Metlakatla's unique status as a "reservation"). Put another way, Jones must demonstrate that Nenana venue residents cannot fairly represent "the general attitudes, experiences, and lifestyles of the residents," of Koyukuk. *Smith,* 440 P.3d at 363. As discussed below, Jones failed to make such a showing. This Court should therefore affirm the trial court's order.

### B. Jones has failed to demonstrated that the jury pool for his trial will not represent a fair cross-section of the relevant community

The trial court held an evidentiary hearing on Jones' jury venire motion, wherein Jones presented evidence. After assessing the witnesses'

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credibility and weighing the evidence submitted, the court made several factual findings, which this Court must accept unless this Court concludes, after viewing the record in the light most favorable to the judge's ruling, that the findings are clearly erroneous. [Pet., App. 1]; *Smith*, 440 P.3d at 363; *Munson v. State*, 123 P.3d 1042, 1046 (Alaska 2005); *Ahkivgak v. State*, 730 P.2d 168, 171 (Alaska App. 1986).

Overall, the judge found, "[t]he differences between Nenana [the presumptive trial site] and Galena [the area from which Jones argues his jury should be drawn] simply do not rise to the level of 'distiguish[ing] one culture from another.'" [*Id*. at 15 (quoting and altering *Alvarado,* 486 P.2d at 900)] The judge also found, "the construction of the Parks [H]ighway did not strip the people of Nenana of their cultural norms. The Alaska Native population of Nenana shares the attitudes, ideas, values, and experiences of other members of the Tanana Chiefs Conference."[5] [Pet. App. 1, at 14, 16-17] "The rural residents of Nenana share the attitudes, values, and experiences of other Rural Alaskans." [*Id*. at 14] And the court found, "Nenana and Galena bear many demographic and economic similarities." [*Id*.] These factual conclusions are amply supported by the record, and so are not clearly erroneous. *See Barbara*

[5] The villages included in the venue districts at issue here are members of the Tanana Chiefs Conference. [Appendix A, Courtroom 304, at 10:52:25-10:55:58 (Nov. 6, 2019)]



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*P. v. State, Dept. of Health & Soc. Services*, 234 P.3d 1245, 1257-58 (Alaska 2010) (the trial court's factual findings are clearly erroneous only when they are not supported by substantial evidence in the record).

First, the court concluded that the testimony by two of Jones' experts (Father Michael Oleksa and Dr. Chase Hensel) was not as credible, reliable, or persuasive as the testimony of Jones' third expert, Elisabeth Jaeger. [Pet. App. 1, at 15] Ms. Jaeger's testimony was based on nearly 40 years' experience traveling and working in the relevant communities, and was "grounded on the present realities of the communities and populations at issue in this case." [*Id.* at 15-16] In contrast, the other experts' testimony was "overly generalized, historical, and academic," having been "extrapolated from global patterns and trends" or "based solely on reading secondary sources." [*Id.* at 15] Jones' claim that the trial court's factual findings are erroneous requires this Court to place greater weight and reliance on Father Oleksa's and Dr. Hensel's testimony, than Ms. Jaeger's. But when reviewing a trial court's factual findings, this Court does not re-weigh the evidence or assess credibility. Instead, this Court defers to the trial court's ability to make such assessments first-hand, based on personal observation of the witnesses. *Solomon v. Solomon*, 420 P.3d 1234, 1241–42 (Alaska 2018) ("It is the function of the superior court—not the function of [the appellate] court—to judge witness credibility and weigh conflicting evidence.") (internal alterations and citation omitted).



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The trial court placed great weight on Ms. Jaeger's testimony that "Alaska Natives from Nenana speak in the same manner as residents of villages like Koyukuk," and were equally capable of being fair jurors in Jones' case. [Pet. App. 1, at 16, *see also id*. at 4-5 (summarizing Jaeger's testimony)] This finding is not clearly erroneous and is supported by Ms. Jaeger's testimony that she would speak with Nenana's Native residents using the same language and patterns she would use when speaking with Native residents living in the lower Yukon villages (such as Koyukuk). [*Id*. at 4-5 (citing the audio record of the evidentiary hearing)] The judge's finding is also supported by Jaeger's testimony that "Alaska Natives from Minto, Tanana, or Nenana [(included in the Nenana venire pool)] could be considered as being part of the same cultural group as those from Nulato, Koyukuk, or Galena [(off-road communities in the Galena venire pool)]." [*Id*.] Jaeger also testified that "Native jurors from Nenana would be a fair cultural and political representation of the defendant[ ], victim[ ], and witnesses" in this case. [*Id*.]

Although Ms. Jaeger's testimony was the most reliable and compelling, the court also noted other testimony supporting the court's findings. For instance, Father Oleksa testified that, "Alaska Native residents of Nenana who may have been raised in rural villages, or who came of age before the construction of the Parks Highway, would likely share the same communicative styles of those raised in rural villages off the road system." [Pet.

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Email: ocapleadings@alaska.gov

App. 1, at 3-4] In fact, Father Oleksa testified that race and geographic location are not the critical factors to development of communication style; rather the development of communication styles are ingrained, from birth through three years old, from the immediate members of one's household. [App. A, Courtroom 304, at 9:47:45-9:40:07, 9:55:20-9:57:38, 10:07:30-10:09:23 (Nov. 6, 2019)] Thus, even residents of more urban areas, and residents living along the road system, would share the same communication styles as a resident of an off-road village such as Koyukuk, so long as the residents were raised in households where those patterns predominated. According to Father Oleksa, communication styles take multiple generations to change and assimilate to those of non-household members. However, people can be made aware of and learn to properly interpret differences in communication styles in about one day. [*Id*., at 9:43:35-9:45:06 (Nov. 6, 2019)]

Thus, the trial court concluded, as a factual matter, "[t]he claim that Alaska Natives and others in Nenana have differences in communicative styles [from residents of Koyukuk and Galena] because of their connection to the road system is not supported by the evidence." [Pet. App. 1 at 17] *Cf. Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 967 (Alaska 2005) (whether the existence of a cognizable group has been established and whether two groups are similarly situated are questions of fact); *Smith,* 440 P.3d at 363 (findings

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regarding a populations' cultural aspects, that is the general attitudes, experiences, and lifestyles, are factual findings reviewed for clear error).

The court's findings are also supported by Dr. Hensel's testimony that Nenana and Galena share similar racial, educational, and income demographics. [Pet. App. 1 at 5, 14] The court also found, "perhaps most importantly, none of [Jones'] experts were able to identify specific attitudes, ideas, values, and experiences that might distinguish residents of Koyukuk from residents of Nenana." [*Id*. at 16-17]

Having reached the sound factual conclusion that residents of the Nenana Venue District share and can adequately represent the attitudes, ideas, values, experiences, and speech styles of residents of Koyukuk and Galena, the court correctly reached the legal conclusion that presenting Jones' "case to a Nenana jury would not result in the exclusion of a distinctive, cognizable group." [Pet. App. 1 at 17] *Cf. Smith* 440 P.3d at 363 (factual finding that defendant failed to establish differences in the contested populations' general attitudes, experiences, and lifestyles supported the conclusion the defendant failed to establish cultural differences "cognizable" under *Alvarado*).

## II. THE JUDGE DID NOT ABUSE HIS DISCRETION IN DECLINING TO ALTER THE VENIRE POOL

Under Criminal Rule 18(f) and Administrative Rule 15(h)(3), the trial court may change the jury selection area. The "trial judge has a great deal of



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Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

discretion in determining what efforts should be undertaken to obtain a jury in a rural area." *Lestenkof v. State*, 229 P.3d 182, 185 (Alaska App. 2010). Yet that discretionary decision is premised on a determination that the standard jury selection process "will not provide a petit jury which is a representative cross-section of the appropriate community." Alaska R. Crim. P. 18(f); Alaska R. Admin. 15(h)(3) ("If a trial judge determines that the selection area defined in subsection (c) will not provide a trial jury which is a truly representative cross-section of the appropriate community, the trial judge may designate alternate or additional areas from which the trial panel will be selected."). As discussed above, the judge correctly found that a jury representative of the Koyukuk community could be found within the Nenana jury list.

Thus, no grounds exist for using an alternate venire district. In fact, grounds exist for not conducting felony jury selection in Galena, the presumptive trial site for district court trials.

The district and superior court trial sites listed in Criminal Rule 18 were selected because they meet the minimal "standards for courtroom needs and standards for transportation, housing, and feeding of all trial participants." Alaska R. Crim. P. 18(c), (d). For crimes arising in Koyukuk, Galena is the presumptive trial site for district court trials (which require fewer people and less time than a felony trial) and Nenana is the presumptive trial site for superior court trials. That is, the court system's administrative



**Department of Law, Criminal Division**
Office of Criminal Appeals
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Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

director has assessed whether Galena is a suitable location for holding felony trials, and has concluded that it cannot meet the minimal standards for housing and feeding all felony trial participants.

Nevertheless, the trial court held an administrative hearing to determine the feasibility and costs of not simply expanding the Nenana venire list, but *changing* the venire area to Galena. The court found that the Galena venire list includes only 120 prospective jurors, 35 of which the court predicted could not be seated, leaving a pool of only 85 potential jurors for a murder trial. The court also noted significant security and personnel challenges in transporting Jones and the necessary people to Galena to conduct voir dire. [Pet. App. 1, at 8-9] Were the jury to be composed of Galena jurors, the trial would then need to be conducted in Fairbanks, due to accommodation and travel logistics. Doing so would cost an estimated $15,750 for each week of trial. And because Galena venue residents would not be able to return home each night, those jurors would experience significant disruption to their work, home, and family responsibilities. [*Id*. at 21, n.42]

Given these factors, the trial court did not abuse its discretion in declining, at this stage, to alter the venire list. Should voir dire demonstrate that the actual jurors summoned will not constitute an impartial jury that is a fair cross-section of the community, the trial court retains authority to expand the venire pool or order a change in venue.



**Department of Law, Criminal Division**
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

## CONCLUSION

As established above, this Court should affirm the trial court's rulings for several reasons. First, the judge applied the correct, pre-existing standards for ruling on Jones' motion, and his conclusions are correct. *Cf.* Alaska R. App. P. 402(b)(2), (3). Further, if voir establishes that an impartial jury comprised of a fair cross-section of the community cannot be seated from the current jury list, Jones can renew his motion in light of those circumstances. *Cf.* Alaska R. App. P. 402(b)(1). This Court need not order further briefing on this issue.

DATED May 12, 2020.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: _____
Ann B. Black (0105010)
Assistant Attorney General

**Department of Law, Criminal Division**
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov

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**CERTIFICATE OF SERVICE AND TYPEFACE**

I, Sylva M. Ferry, state that I am employed by the Alaska Department of Law, Office of Criminal Appeals, and that on May 12, 2020, I mailed a copy of the State's RESPONSE TO PETITION FOR REVIEW and this CERTIFICATE OF SERVICE AND TYPEFACE in the above-titled case to:

William R. Satterberg
Law Office of William Satterberg
709 4th Avenue
Fairbanks, AK 99701

I further certify, pursuant to App. R. 513.5, that the font used in the aforementioned documents is Century Schoolbook 13 point.

Sylva M. Ferry

**Department of Law, Criminal Division**
Office of Criminal Appeals
1031 W. 4th Avenue, Ste 200
Anchorage, AK 99501
Phone: (907) 269-6260 Fax: (907) 276-3697
Email: ocapleadings@alaska.gov